NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re WORLD-X, INC., Debtor.	Bankruptcy No. 01-05146-M7 Adversary No. 03-90174-M7
GERALD DAVIS, Trustee, Plaintiff, v. STEVEN A. MCKINLAY, MCKINLAY BUILDERS, INC., NEWPORT ONE PROJECT, INC., FOOTHILL ONE PROJECT, INC., FOOTHILL TWO PROJECT, INC., BVD DEVELOPMENT, INC., ANDREW PHILLIPS, INC., PAYMENT RESOURCES INTERNATIONAL, SERENITY DEVELOPMENT, LTD., and SUMMER SOLUTIONS LTD., Defendants.	MEMORANDUM DECISION

Gerald Davis ("Trustee"), as trustee for the bankruptcy estate of World-X, Inc. ("Debtor"), filed this adversary proceeding to avoid various transfers. The present matter concerns the summary judgment motions of the Trustee and that of Andrew Phillips ("Phillips"), Payment Resources International, Serenity Development, Ltd. and Summer

Solutions Ltd. (collectively the "Defendants"). A hearing was held on October 6, 2005 at which time the Court took the matter under submission. On November 3, 2005, the Court issued an order for supplemental briefs. The Trustee filed a supplemental brief on November 17, 2005, and the Defendants filed their brief on December 1, 2005.

The Trustee's case against the Defendants is based on his contention that a resulting trust should be imposed by the Court over certain parcels of real property. The Court has previously described the various aspects of the Debtor's enterprise. See Davis v. Arellano, et. al., Adv. No. 02-90312-M7 (Memorandum Decision, entered on October 10, 2003). In one program, the Debtor offered to make loans to program participants, but first a participant had to make a "credit enhancement deposit" of 10% of the amount ultimately requested. Steven McKinlay ("McKinlay") was a participant in that program. He borrowed $300,000 from Phillips and deposited the funds with World-X. World-X then advanced funds for the purchase of three parcels of real property known as La Vereda, Foothills, and Newport properties.

McKinlay defaulted on the loans to Phillips. Phillips eventually obtained the Newport property when another creditor foreclosed on that property. Furthermore, McKinlay, or an entity controlled by McKinlay, transferred La Vereda and Foothills to Phillips or an entity controlled by Phillips in satisfaction of the debt owed by McKinlay to Phillips.

The Trustee contends that the Debtor had an interest in all three properties and that the transfers were fraudulent transfers. He also claims that the transfers of alleged estate assets violated the

automatic stay. He contends that the funds from World-X were not a loan to McKinlay, but instead McKinlay and World-X allegedly had an understanding that the true owner of the real property was World-X, even though title was recorded in McKinlay's name. The Trustee relies on the principle that "where a transfer of property is made to one person and the purchase price is paid by another, a resulting trust arises in favor of the person by whom the purchase price is paid." Majewsky v. Empire Constr. Co., Ltd., 2 Cal.3d 478, 485 (1970).

However, a resulting trust is not based simply on the fact that money of one person has been used by another to purchase property. Id. When analyzing whether a resulting trust should be imposed, the determining factor is the intent of the parties. There must be evidence of a conscious and intentional advance of consideration by a party for the purchase of property to be owned by that same party, even though there is an agreement that title will be placed in the name of different party. Id.

An examination of applicable case law illustrates the factors to be considered by the Court in determining the intent of the parties. In Majewsky, the defendant agreed to purchase a parcel of real property. Before doing so, he located another buyer, the plaintiff, so that the defendant could immediately resell the property at a profit. The sales were consummated on the same day, but the plaintiff subsequently discovered that judgment liens against the defendant attached in the brief moments that the property was owned by the defendant. The plaintiff argued that his money was used by the defendant to effect the first sale, and contended that the two transactions should be treated as a resulting trust in his favor such that the defendant never held title, and therefore, the judgment liens

would not have attached to the property. The court rejected this argument and ruled that the plaintiff failed to present any evidence to satisfy the requisite intent. The fact that the defendant used the plaintiff's funds for the initial purchase was not sufficient to support the imposition of a resulting trust.

In Matter of Torrez, 63 B.R. 751 (9th Cir. BAP 1986), the debtors claimed ownership of property recorded in their names. The debtors' parents contended that they were the true owners of the property by way of a resulting trust. The parents made the downpayment for the property and encumbered the property with a deed of trust to the former owners of the property, but they had title placed in the debtors' name in order qualify for benefits from a governmental irrigation program. The parents proceeded to make all subsequent payments on the deed of trust and paid all the property taxes. Furthermore, the parents farmed the land without any lease agreement with the debtors. Also, the parents made improvements on the land. Finally, the debtors executed a promissory note secured by the property, and the proceeds of the note were given the parents, who also then repaid the note in full. The Panel ruled that a resulting trust should be imposed in favor of the parents.

In Novak v. Novak, 249 Cal.App.2d 438 (1967), the court stated that the entity providing the funds may be the trustee rather than the holder of the beneficial interest where the payment was actually a loan to the beneficiary. The court also stated that the promise to repay the loan may be implied from the circumstances, and in such a situation the trustee holds legal title merely as security for repayment of the loan. 249 Cal.App.2d at 442. The court found that a resulting trust existed where the beneficiary of the trust made all

the payments on the trust deed owed to a third party, paid the taxes and insurance, and maintained and improved the property.

In a case involving a fraudulent transfer between an individual and his attorney, the client (transferor) made an oral representation of ownership to a third party in the presence of the transferee/ defendant (the client's attorney), and the defendant did not refute the representation. McGee v. Allen, 7 Cal.2d 468 (1936). Later the defendant claimed he owned the property himself. The court stated that the failure of the defendant to refute the client's representation of ownership was evidence that there was no intent to effect an actual transfer of ownership from the client to the attorney, and the transfer was simply a device to hinder creditors of the client. The court also noted that the client took other actions indicating he was treating the property as his own, including making representations to his creditors that he owned the property.

This Court, in ordering the filing of supplemental briefs, specifically asked the Trustee to set forth all the evidence he had in support of his argument that a resulting trust should be imposed. It amounted to essentially two items. The first is the deposition testimony of McKinlay. The second is a document entitled "Letter of Intent" that has not been signed by any party.[1]

The Letter of Intent does not help the Trustee's case. It states that the transaction between McKinlay and World-X will be structured as a joint venture. However, the Trustee has specifically stated that he "contends there was no formal joint venture." Supplemental Brief,

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[1] The Defendants raise evidentiary objections as to both. However, because the Trustee's argument fails even if both are considered by the Court, the Court need not reach the issue of whether the deposition and the Letter of Intent are admissible.

p.13, ll. 4-5. The Letter of Intent also delineates the ownership percentage to be held by the parties, and sets forth World-X's interest at 15% (and not "at least" 15% as suggested by the Trustee). This is inconsistent with the argument that the parties' intent was for World-X to own full title to the properties while they were held in McKinlay's name. Furthermore, the document states that the "Project Loan Amount" will be $3,000,000 provided by World-X, and it provided for a "Loan Interest Rate." Both of those provisions are inconsistent with the resulting trust argument.

Additionally, the Letter of Intent states that "the joint venture structure mainly serves to provide loan and equity interest security to World-X as it is not a bank." The quoted language hardly suggests that the Debtor intended to be the actual owner of the properties. Instead, the most reasonable reading is that the Debtor was attempting to set up a mechanism for securing the loan amount it was providing, assuming it was attempting to do anything legitimate.

The Trustee contends that the Debtor failed to take any measures one would expect of a true lender. For example, the Trustee states that the Debtor never sent a loan statement to McKinlay, never received payments from McKinlay, and never obtained any signed documents or promissory notes from McKinlay. On the other hand, the Trustee has also argued, in this proceeding and in other adversary proceedings, that the Debtor was a sham entity simply run as a Ponzi scheme. The Trustee cannot have it both ways, on the one hand arguing that meaning should be implied from the Debtor's failure to follow normal business practices, and on the other hand contend that the

Debtor was a fraudulent scheme.[2]

The deposition testimony of McKinlay also is not helpful to the Trustee. Granted there are several times when he asserted that he believed that World-X was the actual owner of the property. However, the review of case law demonstrates the factors evidencing an indicia of ownership, and the Trustee has not presented any evidence on those factors that would support his case.

In fact, the evidence on those factors works against the Trustee. For example, McKinlay executed quitclaim deeds in favor of Phillips as if he owned the property. At a meeting attended by representatives of World-X, McKinlay stated he would satisfy the outstanding obligation to Phillips by transferring the property to Phillips, and the World-X representatives sat silently, never asserting that McKinlay had no such right on the ground that World-X owned the property. McKinlay took new loans secured by the property. And finally, he provided financial statements in which he claimed to own the properties. In other words, all indicia of ownership that has supported a finding of a resulting trust in other cases, supports the opposite conclusion in this case. See also Cal. Evid. Code § 638 ("A person who exercises acts of ownership over property is presumed to be the owner of it.")

The Trustee has failed to come forward with any evidence other than the statements of McKinlay that would support a finding of a resulting trust. And even McKinlay's statements are inconsistent.

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[2] Typically, in the course of fraudulent schemes, a debtor will follow through on some of its promises by making transfers, but this is either to delay discovery of the scheme or to create the appearance that a "legitimate profit making business opportunity exists." In re Agricultural Research and Technology Group, 916 F.2d 528, 531 (9th Cir. 1990).

When asked by counsel for the Defendants to explain his relationship with World-X, McKinlay provided the following:

> Q: Were you in any part of World-X –
> A: Not at all.
> Q: – employee, agent, joint venturer?
> A: Not at all.
> Q: You were nothing?
> A: Not at all.
> Q: Okay. Your relationship to them was arm's length?
> A: Absolutely.
> Q: It was as borrower and a lender?
> A: Absolutely.

Furthermore, there is the following exchange between the Trustee's counsel and McKinlay from the same deposition:

> Q: Okay. Please take a look at the third paragraph on that first page of the Letter of Intent. It says, "In addition, World-X shall retain equity interest in the project as described herein.
>
> A: That's correct.
>
> Q: And World-X was supposed to provide $3 million as a loan in exchange for a deposit of $300,000, according to your agreement with World-X, right?
>
> A: That's correct.

While McKinlay goes on to make statements that contradict this characterization of the transaction as a loan, the evidence supports the loan characterization and does not support the assertion that World-X was intended to be the title holder to the properties. For example, besides the evidence set forth earlier, the Trustee has provided a document marked as Exhibit G to the declaration of the Trustee's counsel. Exhibit G is a letter from one of the World-X insiders to Emmet McKune, who represented Phillips. The letter clearly describes the funds advanced in connection to the Foothills property as a loan, including setting forth the interest rate and a one-point fee for the loan.

The standard for summary judgment is "whether a reasonable jury

could find that the party which bears the evidentiary burden at trial with respect to a claim or defense proved its case 'by the quality and quantity of evidence required by the governing law.'" Agricultural Research, 916 F.2d at 533-34 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 254 (1986)).

The Trustee would bear the burden at trial to show by clear and convincing evidence that the parties' intent was for the Debtor to be the actual owner of the property. Johnson v. Johnson, 192 Cal.App.3d 551, 556 (1987). While all reasonable inferences from the evidence are drawn in favor of a non-moving party, as the party who bears the burden of proof at trial, the Trustee must make a showing sufficient to establish the existence of the elements essential to his case in order to defeat the Defendants' motion. A mere scintilla of evidence is not sufficient to withstand the motion. Agricultural Research, 916 F.2d at 533.

The evidence provided does not support the Trustee's argument, and in fact, it supports a contrary conclusion. Given this, the Court will GRANT the Defendants' motion for summary judgment and DENY the Trustee's motion for summary judgment.

Counsel for the Defendants is directed to submit a form of order consistent with this Memorandum Decision within 14 days of the entry of this decision.

Date: MAR 1 2006

Hon. James W. Meyers
UNITED STATES BANKRUPTCY JUDGE